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Before the  
FEDERAL COMMUNICATIONS COMMISSION FCC MAIL SECTION  
Washington, D.C. 20554

MAY 6 1994  
FCC 94M-321  
41759

In re Applications of	)	MM DOCKET NO. 93-94 ✓
SCRIPPS HOWARD BROADCASTING COMPANY	)	DISPATCHED BY
	)	File No. BRCT-910603KX
For Renewal of License of Station WMAR-TV	)	
Baltimore, Maryland	)	
	)	
and	)	
	)	
FOUR JACKS BROADCASTING, INC.	)	File No. BPCT-910903KE
	)	
For a Construction Permit for a New	)	
Television Facility on Channel 2	)	
at Baltimore, Maryland	)	

MEMORANDUM OPINION AND ORDER

Issued: May 04, 1994

Released: May 06, 1994

1. This is a ruling on a Motion For Partial Reconsideration And/Or Clarification that was filed on April 18, 1994, by Four Jacks Broadcasting, Inc. ("Four Jacks"). On April 28, 1994, the Mass Media Bureau ("Bureau") filed its Comments. There has been no Reply or Opposition pleading filed by Scripps Howard Broadcasting Company ("Scripps Howard").

2. On April 11, 1994, the Presiding Judge's Memorandum Opinion And Order FCC 94M-246 (the "MO&O") was released. The MO&O denied a motion for summary decision that had been filed by Four Jacks seeking a ruling in its favor on added misrepresentation/lack of candor issues. See Memorandum Opinion And Order, 94M-51, released February 01, 1994. The added substantive issue is as follows:

To determine whether Four Jacks Broadcasting, Inc. misrepresented or lacked candor before the Commission in its application, pleadings, documents and/or testimony regarding its integration commitment to resign then current employment positions of David D. Smith, Robert E. Smith, and/or Frederick G. Smith.

Id. at 5. Also to be considered is the effect that the evidence adduced under that issue would have on the basic qualifications of Four Jacks to receive a license for Channel 2 in Baltimore, Maryland. Id.

3. Four Jacks notes accurately that the Commission's rules prohibit a Presiding Judge from reconsidering an interlocutory ruling. 47 C.F.R. §§1.106, 1.291(c)(2). But for trial preparation purposes, the parties are entitled to a clarification of the scope of the relevant inquiry. It is recalled that the Presiding Judge had agreed with the Bureau that a corollary fact issue is "whether the duties of the principals at Sinclair would interfere with the carrying out of the integration pledges made with respect to Four Jacks." MO&O at Para. 19. Four Jacks contends that such evidence would be relevant only as to whether Four Jacks could meet its integration pledge and that such

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evidence would not be relevant as to the misrepresentation/lack of candor issue.

4. In its Comment the Bureau suggests that such evidence might show that even if the principals of Four Jacks are employees of Sinclair,<sup>1</sup> the evidence might show that the functions that they perform for Sinclair in that capacity would not prevent them from fulfilling Four Jacks' integration pledges with respect to Channel 2. Thus, the Bureau sees the relevance in that one respect. However, there is an additional corollary consideration: If the evidence shows that there would be a conflict in the principals' duties as employees of Sinclair and their additional duties at Channel 2, that evidence would be relevant to establishing intent and motivation to prevaricate. See Fox River Broadcasting Co., 93 F.C.C. 2d 127, 129 (Comm'n 1983) (absent the showing of an intent to deceive or mislead, the Commission will not find a disqualifying misrepresentation). The Commission also requires evidence of motive to mislead and there will be no inference drawn of an improper motive merely from an applicant's omissions or inaccuracies. Scott and Davis Enterprises, Inc., 88 F.C.C. 2d 1090, 1099 (Review Bd 1982). Therefore, the evidence will be relevant on the added issue.

5. The Presiding Judge noted that the legal significance of the corollary finding as to whether Sinclair duties would preclude carrying out Four Jacks' integration pledge would not preclude a finding of an intentional misrepresentation. See MO&O at 9 fn. 9, citing FCC v WOKO, Inc., 329 U.S. 223, 227 (1946) (a willingness to deceive may be shown even by immaterial deceptions). Without any mention of that holding, Four Jacks cited cases in which the Commission had found no misrepresentation where the facts did not support an ability to carry out an integration pledge. But upon analysis, it appears that the facts of those cases were found to be lacking substantial evidence of an intent to misrepresent an integration pledge. The two cases are discussed and distinguished below.

6. The Commission did not hold as a matter of Commission policy that no matter what is represented to the Commission in an integration pledge the facts will not support a finding that the applicant misrepresented itself to the Commission. In Evansville Skywave, Inc., 6 F.C.C. Rcd 5373 (Review Bd 1991), the Review Board had found a proposal to be a "sham." The Commission disagreed and found that the evidence did not support that finding and conclusion. 7 F.C.C. Rcd 1699 (Comm'n 1992). There the Commission held:

An applicant's failure to meet its burden in this regard [reasonable assurance that an integration proposal will be effectuated], however, does not, without more, establish that the applicant has committed disqualifying misconduct.

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<sup>1</sup> The misrepresentation/lack of candor issue arose out of the evidence in Phase I that the Four Jacks principals had never intended to resign their positions at Sinclair notwithstanding the integration pledge to resign from current employment.

Id. at 1700. But the corollary proposition would be equally applicable that with more, the evidence could have established disqualifying conduct.<sup>2</sup>

7. In the second case that is relied on by Four Jacks, Doylan Forney, 5 F.C.C. Rcd 5423 (Comm'n 1990), the Commission did not address the issue of whether evidence that showed an inability to meet an integration pledge could also support misrepresentation or lack of candor findings. In that case, the Commission analyzed an integration proposal which contemplated only an advisory role for an integrated principal. The proposal also contemplated hiring consultants who would report to the applicant's principals. The Commission held that an advisor is not a manager for integration purposes. Id. at 5426. But the case does not stand for the proposition that is being advanced by Four Jacks.

8. The Commission has adopted a high standard of candor under WOKO, Inc.:

[T]he fact of concealment may be more significant than the facts concealed because it shows a willingness to deceive the Commission.

Richardson Broadcast Group, 7 F.C.C. Rcd 1583 (Comm'n 1992). See William M. Rogers, 92 F.C.C. 2d 187, 189 (Comm'n 1982) (evasiveness and lack of candor were appropriate issues to be explored; the issue of candor need not even be specified because the Commission has a right to expect candor from its licensees). See also Royce Int'l Broadcasting, 5 F.C.C. Rcd 7063, 7065 n.6 (Comm'n 1990) (subsequent history omitted):

In some particularly egregious cases, the record may indicate that an applicant's integration proposal is not only unreliable but contains false statements amounting to disqualifying misrepresentations. (Citation omitted.) When necessary to resolve the case, an appropriate issue will be added and the matter further considered.

Where statements are made to the FCC and the SEC that appear to conflict on a material fact there is an egregious situation.

#### Conclusion

9. The parties to this case may adduce evidence on the corollary fact issue of whether the duties of the principals at Sinclair would interfere with the carrying out of the integration pledges made by Four Jacks. However, it is noted that there is evidence that is now in the record that relates to the

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<sup>2</sup> The case was remanded to the presiding trial judge on added financial and related misrepresentation issues against the same applicant. The judge and the Review Board found that the applicant had misrepresented itself to the Commission with respect to its financial representations. See Evansville Skywave, Inc., 8 F.C.C. Rcd 7009 (Review Bd 1993).

corollary fact issue. Therefore, cross-examination on that issue will be limited to the testimony adduced in Phase II unless there are facts in the testimony or documents of Phase II which conflict with the evidence adduced in Phase I. Also, it is expected that the record will be made clear with respect to the full meaning of the disclosure made by Four Jacks in Form 301 with respect to management by committee. See MO&O at Para. 9. See also Doylan Forney, supra.

Ruling

IT IS ORDERED that in accordance with the above, the Motion For Partial Reconsideration And Or Clarification that was filed by Four Jacks Broadcasting, Inc. on April 18, 1994, IS GRANTED for purposes of clarification and IS OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Richard L. Sippel", is written over the printed name.

Richard L. Sippel  
Administrative Law Judge